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NO. 85-24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner and Cross-Respondent,

v.

KAMEL ALI ELFADL,

Respondent and Cross-Petitioner

ON WRIT OF CERTIORARI

TO THE COURT OF SPECIAL APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent and Cross-Petitioner, Kamel Ali Elfadl, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Cross-Petition for Writ of Certiorari to the Court of Appeals of Maryland and Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

1888

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Respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Alan H. Murrell
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
Tower Building - Fourth Floor
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4842

Julia Doyle Bernhardt
Assistant Public Defender

Counsel for Respondent

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STATEMENT OF THE CASE

At 11:45 P.M. on Saturday, June 11, 1983, Prince George's County policeman Carlton X. Fletcher (herein referred to as "Fletcher") and Ming Houng Phamdo (herein referred to "Phamdo"), Assistant Manager of the Goddard Mini-Mart in Greenbelt, were shot and killed by two assailants, who robbed them of more than twenty thousand dollars. The money represented the night deposit of the Mini-Mart which was to be deposited by Phamdo; Fletcher was to accompany him as a guard. At the scene, investigators found a spent 20-gauge shotgun shell near Phamdo, two spent 20-gauge

shells near Fletcher, and a shipping carton for a 20-gauge shotgun. Investigators traced the box to a J.C. Penney's store, where they learned that Respondent had purchased the shotgun. Independently, the officers ascertained that Respondent had been an employee of the Mini-Mart but had been transferred after being suspected of a $16-18,000 larceny.

At 3:00 P.M. on Sunday, June 12, 1983, on the instructions of Detective Daniel Statkus, three police cars converged, lights flashing, on a car driven by Respondent and stopped it. One officer had his gun drawn at his side. Detective Steven Ricker asked for Respondent's license and, forgetting to return it, placed it in his shirt pocket, and asked Respondent to accompany him to the police station. Ricker said Respondent agreed and was placed in the rear seat of Ricker's cruiser. Respondent's car was left at the scene. Upon arriving at the police station approximately fifteen minutes later, Detective Ricker turned Respondent's license over to Detective Statkus, who kept it because he was not part of the interviewing process that day. Respondent was placed in an interview room where he was interviewed by Ricker for approximately one hour and a half.

Detective Hatfield took over the interviewing of Respondent at 5:40 P.M. Respondent was not advised of his Miranda rights at that time or at any time in the ensuing interview because he was not "at that point in time actually in an accusatory status." In the course of the interview, Respondent, a Moslem, indicated that that particular date

was a religious feast, and at his request, officers Steven Ricker and Daniel Murphy transported him to his apartment to pray and eat. They remained with him, kept him under constant observation, and transported him back to the Criminal Investigation Division at between 9:30 P.M. and 9:45 P.M. Hatfield then resumed his interview with Respondent. Sometime prior to 1:30 A.M. on June 13, the substance of the interview was reduced to writing and signed by Respondent.

At 1:00 A.M., Detective Hatfield summoned a polygraph operator, who was told that Respondent was a suspect whom the police wished "to rule out or decide what [they] were going to do with him." Respondent, the police said, agreed to the polygraph after being advised of his right not to take it. He signed a waiver to that effect at 3:25 A.M. The polygraph examination evidently lasted until shortly after 6:00 A.M. on June 13. He was then interviewed by a number of other officers until approximately 3:00 P.M., at which time he was considered a suspect. Throughout the period, however, according to the officers, Respondent was free to leave. Detectives Ricker and Edgar drove Respondent to his apartment at 4:00 P.M. on June 13 and obtained his consent to search the apartment. In the search the officers recovered shotgun shells, receipts, and an address book. The officers left Respondent at his apartment. Detective Hatfield placed Respondent under constant surveillance by the Special Operations Division.

Respondent, as a result of his experience on June 12, 13, and because he was aware that he was being followed, contacted an attorney on Wednesday, June 15. The attorney, Stephen Kiefert, testified that Respondent advised him over the telephone that "he felt he was a target or had been questioned by the police in connection with these murders, and they retained his driver's license. and felt he needed to talk to a lawyer. And I agreed that he did. And we set up an appointment for the next day at 2 o'clock."

On the following morning, Thursday, June 16, Respondent called the Criminal Investigation Division and said he wished to pick up his driver's license. Hatfield was advised that Respondent was enroute. Evidence gathered in the interim between Monday and Thursday caused Hatfield to consider Respondent an accused for purposes of questioning and interrogation, and accordingly, when Respondent arrived at 12:30 P.M. with his wife, Hatfield met him, asked "if [Hatfield] could talk to him a few minutes," and advised him of his Miranda rights. According to Hatfield, Respondent then voluntarily waived in writing his rights to counsel, against self incrimination, and to prompt presentment. Hatfield denied Respondent's claim that he had advised Hatfield of his need to make the 2 o'clock appointment with Attorney Kiefert. Interrogation of Respondent then commenced.

Detective Hatfield, who had been interrogating Respondent since 12:30 P.M., terminated his interview because he "was to the point where I was no longer able to think, I mean, I was just tired." Detective Michael Ferriter took over the interrogation and at 12:50 A.M. on Friday, June 17, advised Respondent of his right to remain silent, his right to talk to a lawyer for advice before being asked questions and to have the lawyer with him while he was questioned, his right to appointed counsel if he could not afford one, and his right, once questioning commenced, to stop answering at any time. Ferriter said he also explained to Respondent his right to prompt presentment. Ferriter recounted Respondent's statement that he understood his rights and was willing to answer questions without having a lawyer present and Ferriter proceeded to converse with him until 1:55 A.M.

At 2:15 A.M. Detective Edgar entered the interview room where Respondent was being held and read to him his Miranda rights from a waiver form. Edgar said that Respondent then signed the form and that he did so without any promises or threats on Edgar's part. Detective Edgar interviewed Respondent until 3:00 A.M. and verified from him that the shotgun box recovered at the scene was his. At 5:34 A.M. Hatfield obtained Respondent's signature on yet another waiver of rights form and took another statement from him at that time. At 10:36 A.M. Hatfield gave to Respondent a

typed statement memorializing the interview which had concluded at 5:34 A.M. The statement recounted Respondent's assertion that on June 7 or 8, 1983, he sold his Remington shotgun in its box to one of three black males whom he met while working at an Amoco Station in Washington and that at 3:00 A.M. on Sunday, June 12, one of those black males woke him up, handed him a bag with approximately $4,000.00 in it, and ordered him not to tell anybody about the money. Hatfield testified that Respondent read the statement and signed it at approximately 11:45 A.M. Shortly after noon, Hatfield went home to rest. At 12:45 P.M. Detective Bruce Gentile entered the interview room and found Respondent asleep on chairs. Gentile woke Respondent for an interview and explained to him the Miranda rights which had been explained to him previously. Gentile asked Respondent to relate to him the details as he knew them as to what happened at the Mini-Mart on June 11, 1983. Gentile testified that in an interview which lasted until 2:15 P.M., Respondent admitted complicity in the robbery murder. At 3:25 P.M., District Court Commissioner Farmer was taken to the C.I.D. where she saw Respondent for purposes of presentment pursuant to Maryland District Rule 723. The Commissioner's Initial Appearance Report indicated that Respondent wished the services of an attorney.

Lina Sleem, who accompanied Respondent to the police station around noon on Thursday, June 16, waited for him at the police station (being kept in interrogation

rooms) until 4:00 A.M., Friday, June 17, when she left. At 11:42 A.M. on Friday, June 17, Ms. Sleem called the law offices of Harry Trainor. Mr. Trainor was not in the office at the time, but returned her call at 1:00 P.M. Sleem explained that her husband had been held by the police since 1:00 P.M. the prior day and Trainor replied that if she needed help she should call him back. She called him again at 3:00 P.M. and retained Trainor "to go find out what the situation actually was." At 3:30 P.M. Mr. Trainor called the C.I.D. and spoke with Sgt. H. M. Bottjer and indicated that he wished to speak with his client, Respondent, right away, and that he wanted the interrogation to cease. Sgt. Bottjer denied Trainor's request to speak with Respondent since he "was in interview and I wasn't going to interrupt that particular interview."

After finishing with the Commissioner at 3:45 P.M., Respondent was returned to an interview room, signed a long form waiver and, according to Gentile, began to dictate a twelve-page statement while Gentile typed. By this time, most of the officers at the C.I.D. were aware that Respondent had given an oral statement incriminating himself.

Trainor left his office and at 4:20 P.M. arrived at the C.I.D. in Forrestville. At 4:25 P.M. Trainor spoke with Sgt. Bottjer and renewed his request to see his client and gave the Sgt. his card for delivery to Respondent. Bottjer left and when he returned at 4:45 P.M. he denied his request and declined to deliver the card to Respondent and advised

Trainor that Respondent had been charged with murder. Trainor then spoke with Lt. Miller and renewed his request. Trainor testified that Lt. Miller's response was that Respondent was not Trainor's client "because he didn't call you," that he could not see him under any circumstances in that building, and that he would not be able to see him until he was taken to Upper Marlboro "fairly soon." Trainor then returned to his office to meet with Sleem and her brother. Detectives Hatfield and Statkus were advised of Trainor's request to see Respondent. At 6:00 P.M. Trainor called Bottjer and asked him to call Trainor when Respondent was being transported. At 6:05 P.M., Detective Gentile finished typing Respondent's statement wherein he fully admitted complicity in the robbery murder and fully implicated Lodowski as the shooter of Officer Fletcher.

While Trainor was meeting with Sleem and her brother, her mother called and said the police wanted to see her, to bring food and she might be able to see him. They drove to Forrestville C.I.D. again, arriving around 7:00 P.M. where Trainor renewed his request to see his client and was told that Respondent had not been told his attorney was there. About 20 minutes later the sergeant came out and asked them to get some food for Respondent. They left and returned with the food around 8:00 P.M. and Trainor again renewed his request when they gave the food to Bottjer at 8:20 P.M. Around that time Trainor saw two Assistant State's Attorneys, Steven Orenstein and Bond Rhue, in the

hallway and asked them why he was not allowed to see his client. They walked past him without stopping, one saying "this is a police matter."

Lodowski's mother watched while she waited in the lobby, as Trainor's renewed requests to see his client or at least to have Respondent advised that the attorney was outside were denied. At approximately 8:50 P.M., Sgt. Bottjer advised Mr.Trainor that under no circumstances could he or Ms. Sleem see Respondent and that he had not told Respondent that his attorney was outside. Sgt. Bottjer's reasoning was that until the investigator feels the interview is over, the interview is in progress, and in that interim no attorney would be allowed to see his client if there has been a Miranda waiver and the suspect has not personally requested counsel. At that point, Mr. Trainor left the C.I.D. and returned home again giving Bottjer his telephone number at home and at the office so they could call when Respondent was moved.

Sometime around 9:00 P.M. Lodowski's mother, who was sitting on the bench by the jail door, saw the police bring Respondent down the hall to the men's room. As Respondent passed her, 7-10 feet away, she heard him say over and over "I want to see my wife. I asked for an attorney." Respondent appeared tired and dazed and the police, who were all around him, weren't answering him.

Trainor called Forrestville at 6:15 A.M., Saturday morning, spoke with Ferriter who told him that they would

give Respondent Trainor's card when they were ready to move him. Ferriter said Respondent had not been told that Trainor had been retained, was bedded down and was talking to them, trying to better himself. Trainor called again at 9:33 A.M. and this time Ferriter said he had given Respondent his card but would not let Trainor speak to him. Around 1:00 P.M., Saturday, Trainor was called and told Respondent was already at the Upper Marlboro Detention Center. He immediately went over (his office was 10 minutes away) and saw Respondent for the first time around 1:30 or 2:00 P.M. Respondent was unshaven, very tired, complained of pain and Trainor observed a large bruise, about the size of a grapefruit on the upper part of Respondent's chest at shoulder level.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the decision of the Court of Special Appeals of Maryland because of a conflict in the decisions of the courts which have considered the issue presented in the Petition and because the Court of Special Appeals did not use the "totality of the circumstances" approach adopted by some state courts. (Pet. 15,17.) Review of the decision below by this Court is unwarranted, however, because under any reasonable standard, be it the one adopted by the Court of Special Appeals or one analyzing the totality of the circumstances, the confession

obtained from Lodowski would be ruled involuntary and inadmissible. In all of the cases applying the totality of the circumstances approach, the facts were unexceptionable: most involved fairly routine interrogations and the question of voluntariness arose solely from the fact that the existence of an attorney representing or purporting to represent the defendant was made known in some way to the police.

For example, in State v. Blanford, 306 N.W.2d 93 (Iowa 1981), the defendant, after committing two assaults and a burglary, surrendered himself to the authorities. After he was fully advised of his Miranda rights, he confessed. While the defendant was being questioned, an attorney requested that he be allowed to speak to the defendant. The police were not told that the attorney represented the defendant. The court held that the police were under no obligation to let the defendant know that an attorney had asked to see him. 306 N.W.2d at 96. In Blanks v. State, ___ Ga. ___, 330 S.E.2d 575 (1985), the defendant was convicted of burglary, theft and murder with malice. Upon arrest, the defendant was twice fully advised of his Miranda rights and admitted the burglary and theft. The next day, after he was again advised of his rights, during a two hour interview the defendant admitted participating in the murders. During the second hour, the interrogating officers learned that an attorney was outside and wanted to speak to the defendant. The police continued the interview. After the interview, the defendant requested a lawyer and was

allowed to talk to the attorney who had been retained by the defendant's father. The court found the confession voluntary, refusing to accept "a rule which would protect only those with the money and connections 'to bring a lawyer swiftly into the fray.'" 330 S.E.2d at 579, quoting Kasimar, Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does It Matter?, 67 Geo. L.J. 1, 95-96 (1978). In State v. Chase, 55 Ohio 2d 237, 378 N.E.2d 1064 (1978), the defendant was convicted of murder and voluntary manslaughter. After his arrest, the defendant was twice warned of his Miranda rights and twice waived them. The defendant confessed. At some point, two attorneys asked to see the defendant but the defendant was not informed of this fact. The court held that the defendant's statements were not thereby rendered inadmissible since the police were never informed that the attorneys represented the defendant, 378 N.E.2d at 1069-70.

The totality of the circumstances approach has also been applied in reversing a conviction for failure to inform a defendant of the presence of an attorney at the police station while the defendant was being interrogated. In Dunn v. State, ___S.W.2d ___, Texas Court of Criminal Appeals, No. 248-84, decided June 26, 1985, the defendant, on the day following his father's death, was contacted by the Houston police and asked to come to the station after work. He arrived at 6:00 P.M. and was informed that he was a suspect in his father's death. He was given Miranda warnings and,

after appearing in a lineup, was again informed of his rights. After three hours of questioning, at 10:35 P.M. a detective began typing the defendant's confession which the defendant signed at 12:17 A.M. The defendant was unaware at this time that police officers had prevented two lawyers from contacting him during questioning. Slip. op. at 2.

The defendant's wife had contacted attorney Schultz at 10:00 P.M. and requested that he go to police headquarters to represent her husband. Schultz called attorney Schneider, a criminal law specialist, who immediately called police headquarters and told one of the investigating detectives not to talk to the defendant until Schneider arrived and that he would be there in a few minutes. Schneider and Schultz arrived at 11:00 P.M. and were given a pass to see the defendant. When they got to the jail area, they learned that the defendant was not in jail. They returned to the homicide division and learned that the defendant was being questioned in an adjacent room. The attorneys informed a Lieutenant Zoch that they had been retained by the defendant's wife to represent him. Zoch refused to tell the defendant of the attorneys' presence or to give the defendant their business cards. Zoch phoned an assistant district attorney for advice and was told that if the defendant had waived his right to counsel, the attorneys had no right to speak to him during questioning. Schneider attempted to send telegrams to the chief of police, all detectives connected with the case and the defendant but the telegrams

were not delivered. After the defendant signed his confession, the attorneys were permitted to see him. Slip. op. at 2-4.

Examining the totality of the circumstances, the court noted that the attorneys did everything short of kicking in the door to see the defendant at a time when the defendant, if given a knowing and intelligent choice, clearly might have chosen to remain silent. The court concluded that this combination of circumstances prevented the defendant from making a knowing and intelligent waiver and that the confession was obtained in violation of the Fifth Amendment. Slip. op. at 12-14.

CONCLUSION

As the facts in the instant case set forth above demonstrate, under the totality of the circumstances analysis applied by the Texas Court of Criminal Appeals and advocated by the Petitioner, Respondent's confession was inadmissible. The same result would be reached under a Sixth Amendment analysis. Review by this Court, therefore, in the instant case is not warranted.

Respectfully submitted,

Alan H. Murrell
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
Tower Building - Fourth Floor
222 East Baltimore Street
Baltimore, Maryland 21202
(301) 659-4842

Julia Doyle Bernhardt
Assistant Public Defender

Counsel for Respondent

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8/6/85